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IN THE

Supreme Court of the United States

OCTOBER TERM, 2003

MICHAEL ROBLES,
Petitioner,

--against--

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the "conscious avoidance" doctrine may be used in a conspiracy case to establish the defendant's intent to join the conspiracy; whether the instruction may be given when the government's case rests on actual knowledge; and, whether, if there is no evidence of deliberate ignorance, it is harmless error as a matter of law to give the instruction when the government has introduced evidence of actual knowledge.

2. Whether in a securities fraud prosecution, venue lies in the district where the securities trade was "executed" even though neither the defendant or his co-conspirator ever set foot in that district because the defendant could have foreseen that execution could take place there; and whether, notwithstanding United States v. Gaudin, 515 U.S. 506 (1995), venue need only be proved by a preponderance of the evidence.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at United States v. Svoboda, 347 F.3d 471 (2d Cir. 2003), and is set forth at App. 1. The order denying petitioner's petition for rehearing and rehearing in banc is not reported, and is set forth at App. 36.

JURISDICTION OF THIS COURT

The judgment of the Court of Appeals for the Second Circuit was entered on October 24, 2003. (App. 1) Petitioner timely filed a petition for rehearing and rehearing in banc, which was denied on January 16, 2004. (App. 36) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .

Article 3, section 2, clause 3 of the Constitution provides:

> The Trial of all crimes, except in Cases of Impeachment, shall be by Jury; and such trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

STATEMENT OF THE CASE

This Petition raises two important constitutional issues arising from a charged two-person conspiracy involving allegations that two Texans, petitioner Michael Robles and his best friend Richard Svoboda, "hatched an illegal plan" to trade on inside information available to Svoboda through his job at NationsBank. (A. 36)[1] Indicted and tried in the Southern District of New York, Robles was convicted on October 3, 2002, of conspiracy to commit securities and tender offer fraud and substantive counts that charged securities and tender offer fraud.

Robles was sentenced to a term of imprisonment of 41 months, with three years supervised release, and was ordered to pay a fine in the amount of $300,000. (A.118-23) On October 24, 2003, the Second Circuit affirmed his conviction. (App. 1)

1. The first issue raised in this Petition is one that, in recent years, has caused considerable confusion among the lower courts. It concerns the propriety of a conscious avoidance jury instruction in conspiracy cases, when the jury is permitted to satisfy each of the mens rea elements of conspiracy through conscious avoidance. In this case, where the government staked its case on its assertion that the two conspirators together "hatched" a scheme to trade on inside information, the last-minute addition of a conscious avoidance charge permitted the jury to convict Robles even if it entirely disbelieved the government's evidence. Worse, it allowed the jury to find that Robles joined the two-person conspiracy through conscious avoidance.

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[1] References to "A" are to the Appendix filed by Robles with the Second Circuit, which includes, among other things, the Indictment, the Judgment, and excerpts from the trial transcript.

2. The second issue raised in this Petition concerns the propriety of venue in the Southern District of New York, where petitioner conducted each of the trades at issue online from his desk in Dallas, Texas, and where there was no evidence that petitioner or his sole co-conspirator ever set foot in New York, that any of the conversations or activity between the alleged co-conspirators took place in any place other than in Texas, that petitioner directed the trades or any other activity to take place in New York, or that the "execution" of the trades on stock exchanges located in New York City was anything more than electronic computer blips that were routed through New York. Petitioner also contends that the standard of proof for venue, as for any other element, must be beyond a reasonable doubt.

CONSCIOUS AVOIDANCE

Robles and Svoboda were indicted jointly, and planned a joint defense. Svoboda negotiated an eleventh-hour deal with the government, agreeing to testify.

The conspiracy count alleged that Svoboda misappropriated inside information from NationsBank and disclosed such information to Robles; that Robles purchased and sold securities while in possession of such information; that Robles provided Svoboda with a portion of the illegal profits; and that Svoboda provided funding to Robles to facilitate Robles' trading activities. (A. 23-24, 26-27)

Svoboda testified that he told Robles that the information he was giving him was "inside information." (A. 49-50) Svoboda testified about specific conversations that he and Robles had in late 1994 planning to use information, available to Svoboda as a NationsBank credit policy officer, about upcoming mergers and acquisitions being conducted by the bank's clients.

The government tried its case solely on the theory that Robles had actual knowledge that he was trading on confidential

information. The evidence it presented, primarily through Svoboda, was consistent with that theory. Indeed, at the close of the government's case, the prosecutor expressly stated to the judge that:

> it continues to be the Government's position ... that based on the evidence and the Government's case I don't see a need for a conscious avoidance charge.

(A. 70-71) (emphasis supplied). He noted, however, that the issue could emerge through cross-examination of Robles, if Robles chose to take the stand. (A. 71)

Robles took the stand and denied Svoboda's allegations, including Svoboda's contention that they made an agreement to trade on inside information. The government then sought a conscious avoidance charge. (A. 87-88)

Although the trial judge had acknowledged several times that he had "always thought that this [was] a credibility case" between Svoboda and Robles, over defense objection (A. 88), the Court granted the government's last-minute request. (A. 88) Moreover, it noted that the instruction would be given, as the government had requested, in connection with all of the counts, including conspiracy.

The government, in its closing, argued to the jury that it should convict, even if it disbelieved Svoboda entirely, since "anyone in [Robles'] position would have known what's going on."

The charge to the jury included the following language:

> To satisfy its burden of proof beyond a reasonable doubt that Mr. Robles knowingly, willingly and unlawfully entered into the

> conspiracy, i.e., into the agreement, and that he did so with a criminal intent, that is, with a purpose to violate the law, and that he agreed to take part in the conspiracy to promote and cooperate in its unlawful objective or objectives. I will now define the terms which I have used, knowingly, willingly and unlawfully. An act, first of all, is done knowingly if it is done deliberately and purposefully, that is, Mr. Robles' act must have been the product of his conscious objective rather than the product of a mistake or accident or mere negligence or some other innocent reason.

(A. 98)

In the context of the remaining substantive count instructions, the judge again instructed the jury with numerous charges dealing with "knowledge." (See A. 99-102) The jury was told, among other things:

> I have already defined knowingly, willfully and intentionally for you for which you are very grateful. For the defendant to have acted with the specific intent to defraud means that he must have known of the fraudulent nature of the scheme and acted with the intent that it succeed. In other words, to act with an intent to defraud means to act knowingly and with the specific intent to deceive ordinarily, but not necessarily for the purpose of causing some loss to another or to bring some gain to one's self. (A. 102) (Emphasis added)

Finally, toward the close of the jury instructions, the district court ended with "additional charges," which included the following charge on conscious avoidance:

> In determining whether the defendant acted knowingly, you may consider whether the defendant deliberately closed his eyes to what would otherwise have been obvious to him. If you find, beyond a reasonable doubt, that the defendant acted with a conscious purpose to avoid learning the truth, that he was trading on the basis of insider information, then this element may be satisfied. However, guilty knowledge may not be established by demonstrating that the defendant was merely negligent, foolish or mistaken. If you find that the defendant was aware of a high probability that he was trading on the basis of insider information, and that the defendant acted with deliberate disregard of the facts, you may find that the defendant acted knowingly. However, if you find that the defendant actually believed he was not receiving inside information, he may not be convicted. It is entirely up to you whether you find that the defendant closed his eyes, and any inferences to be drawn from the evidence on this issue.

(A. 106) The conscious avoidance instruction was not tailored to any particular aspect of the lengthy charges preceding it. It was made applicable to any prior reference to findings of "knowledge," thus allowing the jurors to use conscious avoidance to find Robles' participation in the conspiracy.

VENUE

Prior to trial, Robles objected to venue in the Southern District of New York. (A. 67-69) At trial, the only evidence relevant to venue in the Southern District came from documentary evidence confirming the execution of buy or sell orders, and from Peter Sullivan, a New York City employee of Charles Schwab & Co. Robles had a brokerage account with

Schwab, through which he made the trades at issue, using Schwab's on-line brokerage services; Schwab generated the confirmation documents and forwarded them to Robles.

Sullivan testified that both the New York Stock Exchange and the American Stock Exchange are located in Manhattan (A. 38), and that Schwab's written confirmation of trades indicated "where the order was executed." (A. 39) Some of these trade confirmations, including those that pertained to the purchases or sales that formed the basis of the substantive counts, showed the "market where executed" to be the American or New York Stock Exchange. (see, e.g., A. 111, 115)

DECISION

The Second Circuit affirmed. In a decision that is in conflict with those of other Circuits – and with theretofore established Second Circuit precedent – it upheld the application of the conscious avoidance doctrine to all aspects of a conspiracy charge. Although previously permitting conscious avoidance to be used, in the conspiracy context, only to find a defendant's knowledge of the illegal objects of the conspiracy, in this case, the Second Circuit concluded that conscious avoidance could be used to establish a defendant's intent to join a conspiracy where there is "further proof that the defendant joined in the illegal agreement with the intent of helping it succeed in its criminal purpose." (App. 16)

As to venue, the Court ruled that "venue is proper in a district where (1) the defendant intentionally or knowingly causes an act in furtherance of the charged offense to occur or (2) it is foreseeable that such an act would occur in the district." (App. 17-18) In an insider trading prosecution, the execution of a trade on a New York exchange was such an "act," and the record supported an inference that a "savvy investor" like Robles "could reasonably foresee that his trades would likely be executed" on the NYSE or AMEX. (App. 18) The Court

rejected Robles' claim that venue must be proved beyond a reasonable doubt, on the ground that it had "repeatedly held" that venue is not an essential element. (App. 20-21)

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE CONFLICTS AND CONFUSION WITHIN AND AMONG THE CIRCUITS OVER THE PROPER APPLICATION OF THE CONSCIOUS AVOIDANCE DOCTRINE IN CONSPIRACY CASES

The first issue raised in this Petition relates to the traditional legal doctrine of conscious avoidance,[2] which, in its origination, was a narrow concept serving a specific purpose;[3] over time, its application has been so broadened that its purpose and meaning have been almost entirely lost.

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[2] Some courts refer to the charge as "willful blindness," some as "deliberate ignorance," and some as the "ostrich charge."

[3] Originally, the doctrine served as "a practical necessity[,] given the ease with which a defendant could otherwise escape justice by deliberately refusing to confirm the existence of one or more facts that he believes to be true." United States v. Reyes, 302 F.3d 48, 54 (2d Cir. 2002), citing Ira P. Robbins, The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea, 81 J. Crim. L. & Criminology 191, 196-202 (1990). However, as Professor Robbins notes, the substitution of the deliberate ignorance doctrine for the actual knowledge requirement is not a particularly well-established principle of the criminal law and was only recently revived in the 1970s by the onslaught of federal narcotics prosecutions. Id. at 199-203 & n. 72.

The "conscious avoidance" doctrine was developed to address those very limited circumstances where a defendant deliberately avoided learning the incriminating facts in order to evade responsibility for his conduct. Professor Glanville Williams described it this way:

> A court can find wilful blindness only where it can be said that the defendant actually knew. He suspected the fact; he realized its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge.

Glanville Williams, Criminal Law: The General Part § 57 at 159 (2d ed. 1961). Traditionally, the instruction was allowed in the "comparatively rare cases" where the evidence "point[ed] in the direction of deliberate ignorance." United States v. Sanchez-Robles, 927 F.2d 1070, 1073 (9th Cir. 1991) (quotation omitted). That, in turn, meant it was appropriate only when the jury "is persuaded that the defendant consciously avoided learning [of a] fact while aware of a high probability of its existence." United States v. Finkelstein, 229 F.3d 90, 95 (2d Cir. 2000). See also United States v. Samaria, 239 F.3d 228, 239 (2d Cir. 2000).

Over time, however, the instruction has become standard in virtually any case in which knowledge is an element of the crime. And, more recently, as this case illustrates, the charge has been expanded to cover not only knowledge, but the very different requirement of intent, even specific intent. In effect, conscious avoidance has evolved into a powerful prosecution tool for establishing the mens rea of almost every federal crime, often when the government's proof of actual knowledge or intent is less than solid.

This dangerous trend has not gone unnoticed by the courts. As the Eleventh Circuit has observed:

> [D]eliberate ignorance is easier to prove than actual knowledge and . . . prosecutors should not be granted such a windfall advantage when the giving of such an instruction is not appropriate.

United States v. Rivera, 944 F.2d 1563, 1571, n. 30 (11th Cir. 1991).

This Petition asks this Court to address two separate issues: both the narrow issue of whether the doctrine of conscious avoidance may be used to establish a defendant's intent to join a conspiracy; and the broader question of when the instruction may properly be given, resolving conflicts within and among the Circuits over such questions as whether it requires evidence of deliberate ignorance or whether a "should have known" standard suffices; whether the instruction may be given when the prosecution's case rests on an "actual knowledge" theory; and whether it is always harmless error to instruct on conscious avoidance if there is proof of actual knowledge.

A. Conscious Avoidance in the Context of a Conspiracy

Conspiracy is a crime with several mens rea components. It "consists not merely in the agreement of two or more but in their intention." Albert J. Harno, Intent in Criminal Conspiracy, 89 U.Pa.L. Rev. 624, 630 (1945). Conspiracy involves two distinct states of mind: that necessary to form an agreement and that relating to the objects of that agreement. The government must prove that the defendant knew of the conspiracy and willfully joined it and that he knew of the conspiracy's illegal objectives and intended to further those objectives. See, e.g., United States v. Hernandez, 218 F.3d 58, 65 (1st Cir. 2000); United States v. Pickorey, 85 F.3d 4, 8 (2d Cir. 1996). Put another way, the government must establish, first, that the defendant "intended to engage in the charged scheme," that is, that he "knew the . . . conspiracy existed and that he knowingly and willingly joined in it;" and, second, that he had "knowledge

of the unlawful aims of the conspiracy. United States v. Reyes, 302 F.3d 48, 53 (2d Cir. 2002).

The Second Circuit, before this case, had long adhered to the rule that conscious avoidance may not be used to establish a defendant's intent to join a conspiracy. A long line of the Court's "precedents" had held that the doctrine could be used to establish "knowledge of the unlawful conspiracy," but not "to prove an intent to participate in a conspiracy." Reyes, 302 F.3d at 54. As the Court explained, "the reason for this distinction is that common sense teaches it is logically impossible to intend and agree to join a conspiracy if the defendant does not know of its existence." Id.[4] Or, as observed in United States v. Mankani, 738 F.2d 538, 547 (2d Cir. 1984), a person cannot consciously avoid participating in a conspiracy and also be a member of the conspiracy because the two notions are mutually exclusive.

In this case, the Second Circuit departed entirely from its precedent, labeling it "pure dictum." (App. 13) After noting that the "broad assertion that conscious avoidance may not be used to prove 'intent to participate' has a capacity to cause confusion," (App. 15), the Second Circuit added to the confusion by abandoning its prior case law, and permitting conscious avoidance to establish a defendant's intent to join a conspiracy

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[4] See also United States v. Tropeano, 252 F.3d 653, 660 (2d Cir. 2001)) ("a conscious avoidance theory may not be used to support a finding that the defendant intended to join or participate in the conspiracy"); United States v. Ferrarini, 219 F.3d 145, 155 (2d Cir. 2000) (same); United States v. Eltayib, 88 F.3d 157, 170 (2d Cir. 1996) (same); United States v. Beech-Nut Nutrition Corp., 871 F.2d 1181, 1195 (2d Cir. 1989) (same).

when there is "further proof that the defendant joined in the illegal agreement with the intent of helping it succeed in its criminal purpose." (App. 16)[5]

Under the Second Circuit's holding, not only may conscious avoidance be used to support a finding of a defendant's knowledge of the objects of the conspiracy – even in a conspiracy of two – but it may also be used to prove a defendant's intent to *join* a conspiracy if there is "further proof

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[5] Some other Courts seem also to be moving in that direction. See, e.g., United States v. Basroon, 38 Fed.Appx. 772, 781-82, 2002 WL 1118029, *7 (3d Cir. 2002) (unpublished) (the government could meet its burden of proving fraudulent intent through a conscious avoidance charge); United States v. Wert-Ruiz, 228 F.3d 250, 255 n. 3 (3d Cir. 2000) (affirming the use of a conscious avoidance instruction to find defendant's participation in a conspiracy "where the jury had ample evidence with which to conclude that, at a minimum, [the defendant] had willfully blinded himself to the fact that a criminal conspiracy existed").

Other Courts have affirmed conscious avoidance instructions in conspiracy cases without bothering to parse out the intent and knowledge elements, thus completely collapsing those separate requirements. See, e.g., United States v. Ciampaglia, 628 F.2d 632, 642 (1st Cir.), cert. denied, 449 U.S. 956 (1980) (conscious avoidance instruction delivered on the issue of intent, permitting jury to draw an inference as to whether defendants had willfully closed their eyes to their participation in a conspiracy); United States v. Picciandra, 788 F.2d 39, 46 (1st Cir. 1986) (upholding conscious avoidance instruction without addressing the doctrine's application to the intent component of conspiracy); United States v. Kehm, 799 F.2d 354, 362 (7th Cir. 1986) (expressly rejecting Second Circuit's traditional rule).

that the defendant joined in the illegal agreement with the intent of helping it succeed in its criminal purpose." (App. 16)

The Second Circuit did not identify what "further proof" was adduced as to Robles specifically; nor did it explain that inscrutable phrase for future application. As to Robles, the only evidence of his intent to join into a conspiracy with Svoboda was the government's proffer of actual knowledge – that is, Svoboda's own testimony that he and Robles agreed to trade on Svoboda's inside information. By thus permitting the same evidence of actual knowledge to double as the facts purportedly supporting deliberate ignorance, the Second Circuit eviscerated the separate requirement of intent, relaxing the standards by which the government can obtain a conspiracy conviction below a constitutionally permissible level.

The instant case presents a paradigmatic set of facts for addressing the appropriate application of the conscious avoidance doctrine in conspiracy cases because, in a conspiracy alleged to exist only between two persons, the dangers arising from the misapplication of conscious avoidance are clearly underscored. Here, through Svoboda's testimony, the government claimed that Robles and Svoboda expressly agreed to trade on inside information, and yet, according to the Second Circuit's decision, the jury was permitted to find an agreement between the two men solely through Robles's consciously avoiding knowing Svoboda's actions - a manifestly illogical notion. In a conspiracy of two, there can be no agreement between the conspirators if one person is found to have deliberately taken steps to avoid acquiring knowledge of their purportedly agreed-upon actions.

Conspiracy, in Judge Learned Hand's memorable words, is the "darling of the modern prosecutor's nursery." Harrison v. United States, 7 F.2d 259, 263 (2d Cir. 1925). It is easy to prove and difficult to define. If conscious avoidance can be used to establish not only the knowledge of the existence of the

conspiracy, but also the defendant's intent to join the conspiracy, the mandate that the government prove, beyond a reasonable doubt, an "intent to agree" will have become virtually meaningless. This Court should take this opportunity to address this very significant, complex, and recurring question.

B. The Conflicts Within and Among the Circuits On The Standards For Charging Conscious Avoidance

On a broader level, the doctrine of conscious avoidance as a whole is in significant disarray, with a resulting broad variance in the standards applied by juries in the different Circuits, and even within a single Circuit.

There is disagreement, for example, over whether the government must introduce proof of deliberate or willful ignorance. The doctrine initially was intended to cover only situations where the defendant consciously took steps to avoid acquiring knowledge in order to insulate himself from liability. Yet, some courts have appeared to endorse a negligence standard that permits a jury to infer knowledge because a "reasonable person" would have known the true facts. In effect, an objective standard that examines a reasonable person's state of mind has been substituted for a subjective standard that examines the individual defendant's state of mind. See, e.g. United States v. Hiland, 909 F.2d 1114, 1130 (8th Cir. 1990) ("[i]n essence, a willful blindness instruction 'allows the jury to impute knowledge to [the defendant] of what should be obvious to him'"); United States v. Picciandra, 788 F.2d 39, 46 (1st Cir.), cert. denied, 479 U.S. 847 (1986) (upholding instruction because "[a]ny reasonable person would have realized" that bags of cash "signalled some form of illegal activity"); United States v. Nicholson, 677 F.2d 706, 710 (9th Cir. 1982) ("The circumstances surrounding the investment opportunity presented to [the defendant] would have put any reasonable person on notice that there was a 'high probability' that the undisclosed venture was illegal").

Other courts, however, have adhered to the principle that conscious avoidance cannot be based on a "should have known" standard. See, e.g., United States v. Ferrarini, 219 F.3d 145, 157 (2d Cir. 2000), cert. denied, 532 U.S. 1037 (2001); United States v. Rodriguez, 983 F.2d 455, 457 (2d Cir. 1993). Only recently, for example, the Second Circuit observed that a standard that permits a finding of guilt based on what the defendant "should-have-known" is a "concept more akin to negligence than to knowledge." Finkelstein, 229 F.3d at 95.

In addition, there is a conflict among the Courts about whether it is appropriate to charge conscious avoidance when the government's case rests on proof of actual knowledge. In this case, the Court approved of a conscious avoidance charge, although the government argued that Robles actually knew of the illegal trading. But other Courts seemingly (although not consistently) have reserved conscious avoidance for "those comparatively rare cases" where defendant claims a lack of knowledge and there are facts that point in the direction of deliberate ignorance. United States v. Garzon, 688 F.2d 607, 609 (9th Cir. 1982). As the Sixth Circuit has written: "Where the evidence relative to knowledge shows that the defendant had actual knowledge of the facts in question, or where the only evidence relative to knowledge shows that the defendant did not have actual knowledge and there is no evidence that the defendant made some deliberate effort to avoid obtaining actual knowledge, an instruction on deliberate ignorance is not appropriate." United States v. Abner, 35 F.3d 251, 255 (6th Cir. 1994),[6] (citing Hiland, 909 F.2d at 1130).

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[6] In United States v. de Francisco-Lopez, 939 F.2d 1405, 1410 (10th Cir. 1991), the Tenth Circuit emphasized that the same facts "cannot be used to prove both actual knowledge and deliberate indifference because the two are mutually exclusive concepts." See also United States v. Caliendo, 910 F.2d 429, 435 (7th Cir. 1990) ("if the evidence against the defendant points

Additionally, and related to the question of whether the charge may be given when the government's case rests on actual knowledge, the courts do not agree on whether the giving of a conscious avoidance charge lacking an evidentiary basis is harmless error as a matter of law if there is some evidence of actual knowledge. Compare United States v. Mari, 47 F.3d 782 (6th Cir. 1995) (if evidence of actual knowledge, but no evidence of conscious avoidance, harmless as a matter of law since jury would not have convicted on conscious avoidance theory); United States v. Adeniji, 34 F.3d 58, 63 (2d Cir. 1994) ("lack of evidence of conscious avoidance, coupled with evidence of actual knowledge, compels a finding of harmless error"); United States v. Stone, 9 F.3d 934 (11th Cir. 1993) (same), with United States v. Aguilar, 80 F.3d 329 (9th Cir. 1996) (since the jury could have "readily convicted the defendant on the basis" of the erroneous instruction, cannot be harmless error); and United States v. Hilliard, 31 F.3d 1509 (10th Cir. 1994) (not harmless error where direct evidence of knowledge but no evidence of deliberate ignorance).[7]

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solely to direct knowledge of the criminal venture, it would be error to give the [ostrich] instruction."); United States v. Rivera, 944 F.2d 1563, 1571 (11th Cir. 1991) ("a court should not instruct the jury on 'deliberate ignorance' when the relevant evidence points only to *actual knowledge*, rather than deliberate avoidance"); United States v. Alvarado, 838 F.2d 311, 314 (9th Cir.), cert. denied, 487 U.S. 1222 (1988) (conscious avoidance charge improper because the evidence tended to show actual knowledge, not deliberate avoidance of obtaining actual knowledge).

[7] But see United States v. Hanzlicek, 187 F.3d 1228 (10th Cir. 1999) (finding sufficient evidence of deliberate ignorance but seemingly adopting "harmless error as a matter of law

The consequences of the rule that a conscious avoidance charge must always be considered harmless error is that the prosecution will always request such a charge, and district courts will err on the side of including the charge even in situations where there is not a shred of evidence supporting the charge. The instant case highlights this problem. Here, the government fought hard for the charge and urged conviction even if the jury did not believe Svoboda's testimony, arguing that knowledge could then be established by conscious avoidance. Yet, after securing a guilty verdict, possibly predicated on the conscious avoidance argument, the government argued, on appeal, that the charge was harmless in light of Svoboda's testimony.

The courts have continued to pay lip service to the traditional underpinnings of the conscious avoidance doctrine, but have so broadened the doctrine, it has lost all meaning. Conscious avoidance, as it is now too often applied, tends to "allow juries to convict upon a finding of negligence for crimes that require intent." United States v. Carrillo, 269 F.3d 761, 769 (7th Cir. 2001), cert. denied, 535 U.S. 1004 (2002) (quotation omitted). The instruction often shifts the burden to the defendant to prove his innocence. The effect of a conscious avoidance instruction "in a case in which no facts point to deliberate ignorance may be to create a presumption of guilt." United States v. Murrieta-Bejarano, 552 F.2d 1323, 1325 (9th Cir. 1997). See also United States v. Fransisco-Lopez, 939 F.2d 1405, 1411 (10th Cir. 1991). And, finally, the "harmless error" rule has encouraged indiscriminate use of the instruction because, if the jury convicts, the prosecution can easily dismiss the importance of the instruction by pointing to the evidence of actual knowledge.

As the lower courts continue to expand the conscious avoidance doctrine, permitting it to be used to satisfy both the

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rationale," without reference to Hilliard).

intent and the knowledge requirements of conspiracy, permitting an "objective" rather than a "subjective" standard, and allowing it to be given when the evidence does not support it, the government, almost reflexively, will continue to demand the charge in any case in which the defendant's intent and knowledge are at issue. There is an urgent need for this Court to intervene and provide guidance to the federal courts on when it is constitutionally permissible to give this charge to the jury, particularly when intent is an element of the crime. Certiorari should be granted on this issue.

II. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE IMPORTANT QUESTIONS INVOLVING THE PROPER TEST FOR VENUE AND TO DETERMINE THE APPLICABLE BURDEN OF PROOF

The second issue raised in this Petition presents questions that go to the heart of American criminal jurisprudence: the appropriate test for venue, and the proper burden of proof. In this case, venue was laid in the Southern District of New York, although all of the activities by the participants in this two person conspiracy took place in Texas. The basis for venue in New York was that, according to trade confirmations sent to Robles, the "market where [some of the trades were] executed," including the trades underlying the substantive counts, was the New York Stock Exchange ("NYSE") or the American Stock Exchange ("AMEX"). Both of those exchanges are located in the Southern District.

The Second Circuit found that there was no evidence that petitioner intended the trades to be executed on either the NYSE or AMEX; however, adopting language torn from a variety of cases, it held that "the fact that Robles was a savvy investor means that he could reasonably foresee that his trades would likely be executed on either NYSE or AMEX." (App. 29)

The highly unusual notion that venue is to be determined by a defendant's state of mind – by his intention or by foresight gained through sophistication as to where an on-line trade will be executed – constitutes a substantial break from this Court's precedent. The issue is thus worthy of this Court's consideration.

Venue is not a mere technicality, but has deep historical roots. The colonial commitment to local trials ran deep, so deep that it played a part in inspiring the American Revolution. Indeed, "the vicinage right was a recurring theme in the struggle for independence." Steven A. Engel, The Public's Vicinage Right: A Constitutional Argument, 75 N.Y.U.L. Rev. 1658, 1680 (2000).

> The generation that ratified the Constitution and the Bill of Rights recognized the vicinage presumption as an essential part of the right to trial by jury. In the struggle for independence, the colonists stood ready to defend "the inestimable Privilege of being tried by a Jury from the Vicinage." [Virginia Resolves (May 16, 1769), reprinted in Journals of the House of Burgesses, 1766-1769, at 214 (John Pendleton Kennedy ed., 1906)] The colonists inveighed against the British for abridging the vicinage right by taking defendants away to England for trial and by protecting British soldiers from the justice of colonial juries. A majority of the early state constitutions expressly protected the vicinage right, and the Antifederalists criticized the federal Constitution for failing to do so adequately. The First Congress framed the Sixth Amendment with an understanding that the traditional vicinage presumption protected the structural interests of the jury system, as well as the rights of the defendant.

Id. In fact, provisions regarding venue appear not once but twice in the Constitution, in both the Sixth Amendment[8] and in Article 3, which provides:

> The Trial of all crimes, except in Cases of Impeachment, shall be by Jury; and such trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

U.S. Const., Article 3, section 2, clause 3.

> The Constitution makes it clear that determination of proper venue in a criminal case requires determination of where the crime was committed.... The provision for trial in the vicinity of the crime is a safeguard against the unfairness and hardship involved when an accused is prosecuted in a remote place.

United States v. Cores, 356 U.S. 405, 407 (1958). See also United States v. Johnson, 323 U.S. 273, 276 (1944) (Frankfurter,

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[8] The Sixth Amendment technically refers to the place from which the jury is to be selected. It is Article 3, section 2, clause 3 of the Constitution that refers to the place where the trial is to be held. Traditionally, however, the Sixth Amendment has "the impact of a venue provision" and has been so construed by the courts. Norman Abrams, Conspiracy and Multi-Venue in Federal Criminal Prosecutions: The Crime Committed Formula, 9 U.C.L.A. Rev. 751, n.1 (1962).

J.) ("Questions of venue in criminal cases ... are not merely matters of formal legal procedure. They raise deep issues of public policy in the light of which legislation must be construed.")

When a statute defining an offense does not expressly indicate where a criminal act is deemed to have been committed, the site of the charged offense "must be determined from the nature of the crime alleged and the location of the act or acts constituting it . . ." United States v. Cabrales, 524 U.S. 1, 5 (1998). See also United States v. Rodriguez-Moreno, 526 U.S. 275 (1999).

Robles' trades, made through an on-line brokerage from a desktop computer in Dallas, were "executed" in the Southern District of New York to the extent that, perhaps, an unidentified person or computer in New York City processed them. The Second Circuit, however, was unwilling to hold that such acts by a machine or by an unidentified person who was not the defendant or his co-conspirator were by themselves sufficient to place venue in the Southern District. Instead, it fashioned a new rule under which venue will lie if defendant intended or could foresee where his on-line trades would ultimately be executed, but would not lie if such intention or foresight was not present, introducing a level of uncertainty that did not exist under prior law. Certainly, although differing formulations of the venue test have been stated, venue has not before turned on a defendant's individual state of mind – his mens rea.

Heretofore, venue has been a matter of locus delicti. In determining the locus delicti of an offense, this Court has directed the lower courts to "identify the conduct constituting the offense . . . and then discern the location of the commission of the criminal acts." Rodriguez-Moreno, supra, 526 U.S. at 279. That endeavor is hard enough. Though from time to time the government has argued for venue based on grounds in addition to locus delicti, this Court has not been quick to embrace

rationales permitting venue based on something other than where the defendant or a partner in crime engaged in criminal conduct. Thus, in Rodriguez-Moreno, this Court declined to express an opinion as to whether venue "also may permissibly be based upon the effects of a defendant's conduct in a district other than the one in which the defendant performs the acts constituting the offense." 526 U.S. at 279, n.2.

Additionally, in the instant case, the trial court charged the jury that the burden of proof on the issue of venue was by a preponderance of the evidence. By upholding the preponderance of the evidence standard, the Second Circuit has applied a standard of proof less than that which the Constitution requires.

In United States v. Gaudin, 515 U.S. 506 (1995), this Court held that the Due Process Clause and the Sixth Amendment guarantee a defendant the right to have a jury determine every element of the crime charged beyond a reasonable doubt.

Nonetheless, the court below relied on a line of Second Circuit cases, including United States v. Bala, 236 F.3d 87 (2d Cir. 2000), and United States v. Middlemiss, 217 F.3d 112 (2d Cir. 2000), reciting the preponderance standard.

Although a long string of cases from the Second Circuit as well as other Circuits have stated and restated, without analysis, that venue may be proved by a preponderance, the preponderance rule has no reasoned basis and it is constitutionally suspect. In the Second Circuit, the principle can be traced back to Blair v. United States, 32 F.2d 130, 132 (8th Cir. 1929). The Blair Court, in 1929, selected the preponderance standard based on the results of its informal survey of the standards used at that time in civil and criminal cases in 13 States, from which it determined that the preponderance standard was more commonly used in those States than the beyond a

reasonable doubt standard. Other Second Circuit cases lead back to Younge v. Unites States, 242 F 788 (4th Cir. 1917), which cites only 1 Underhill's Criminal Evidence, § 36, for the proposition that proof of venue beyond a reasonable doubt is not required.[9]

Where justification is attempted, the preponderance standard has been defended on the ground that venue is not a "substantive" or "essential" element of the crime. As the Third Circuit wrote recently:

> When Courts describe venue as an element, they often distinguish it from 'substantive' or 'essential' elements. See United States v. Kaytso, 868 F. 2d 1020, 1021 (9th Cir. 1988); United States v. Griley, 814 F. 2d 967, 973 (4th Cir. 1987); [United States v.] Miller, 111 F. 3d [747,] 749 [(10th Cir. 1997)]; Wilkett v. United States, 655 F. 2d 1007, 1011 (10th Cir. 1981). The Fifth Circuit has explained that while venue is an element, it will be protected less vigorously than other elements. See [United States v.] Winship, 724 F. 2d [1116,] 1124 [(5th Cir. 1984)]. Likewise, the Seventh Circuit has recognized that while one may call venue an element, 'it is an element more akin to jurisdiction than to the substantive elements of the crime.' United States v. Massa, 686 F. 2d 526, 530 (7th Cir. 1982) (citing [United States v.] White, 611 F. 2d. [531,] 536 [(5th Cir.), cert.

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[9] A more recent edition of the Underhill treatise shows that, as of 1973, the states were almost equally divided on the burden of proof, 14 requiring proof beyond a reasonable doubt and 16 requiring only proof by a preponderance. 1 Underhill's Criminal Evidence, § 98 (6th ed. 1973).

> denied, 446 U.S. 992 (1980)]. Put another way, '[v]enue is wholly neutral; it is a question of procedure, more than anything else, and it does not either prove or disprove the guilt of the accused.' Wilkett, 655 F. 2d at 1011.

United States v. Perez, 280 F. 3d 318, 330 (3d Cir.), cert. denied, 537 U.S. 859 (2002).

Even so, the federal caselaw on the subject is not in complete accord. In United States v. Andrus, 775 F.2d 825, 846 (7th Cir. 1985), the Seventh Circuit, citing United States v. Jones, 174 F.2d 746, 748 (7th Cir. 1949), stated that "[v]enue is an essential element of an offense that the government must prove beyond a reasonable doubt." The Third Circuit only recently adopted the preponderance standard for venue, resolving a question which that Circuit had reserved 20 years earlier. See Perez, supra, 280 F.3d at 330.

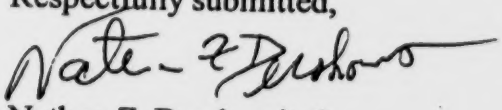
Given that defendant's venue rights in a federal prosecution are rooted in our nation's history and in our Constitution, and this Court has squarely held that every element of a crime must be proved beyond a reasonable doubt, these cases cannot provide a sufficient legal basis for upholding the preponderance standard.

In light of Gaudin, this Court should grant certiorari and determine whether the preponderance standard of proof – an obvious anomaly – is constitutionally valid.

CONCLUSION

This Petition raises two important constitutional issues about which the law is in conflict. Had the defendant prevailed on any of these issues, the government likely would have sought certiorari because of their significance. The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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